No. 80-1531

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In The

Supreme Court of the United States

October Term, 1980

TWIN FALLS CANAL COMPANY, a corporation, its Board of Directors, JOSE BARINAGA, THOMAS OLMSTEAD, FAY FRAHM, WILLIAM L. WATT and WILLIAM RUDE; and its Manager, CLIFFORD MONTGOMERY,

Petitioners,

vs.

CANYON VIEW IRRIGATION COMPANY, A corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I. Background

The petitioner's statement of the case is correct so far as it goes. However, it does gloss over points which respondent feels are very important. We will refer to Twin Falls Canal Company as TFCC and Canyon View Irrigation Company as Canyon View. All references to Appendix are made to petitioner's brief.

The purpose of the declaratory judgment was to ask the court to decide whether or not Canyon View had the right under the Idaho law of eminent domain to condemn the right of way through TFCC's canal system since no natural waterway exists by which Canyon View's water could be transported by gravity from the Snake River to its stockholders' land (Stipulation of fact number VIII, Appendix B, page 4). It is Canyon View's contention that the question of whether or not Canyon View has the right of eminent domain includes within the very subject the question of necessity.

The stipulation also set forth Canyon View's proposal that the canal system which would be used by both parties would be maintained by TFCC (Appendix B, page 7). Again it is Canyon View's contention this stipulation put the question of operation and maintenance of the canal before the court.

The district court in its opinion held that Canyon View could not condemn the right of way into TFCC's canal system because it could not compel TFCC to operate and maintain the enlarged system for its benefit and because it had no right to exchange water with TFCC by force (Appendix C, page 14). The Idaho Supreme Court in *Canyon View Irrigation Company v. Twin Falls Canal,* (Idaho, 1980) 619 P. 2d 122, reversed the district court, holding that there was no exchange of water but a commingling of water (Appendix A, page 11), that Canyon View needed only to show a reasonable necessity and that the record supports a showing of reasonable necessity (Appendix A, page 9), and then reversed the district court's holding on the question of operation and mainten-

ance of the canal, stating that both parties have the right to the use of the canal right of way, and neither can exclude the other, and as easement co-tenants, both TFCC and Canyon View would have duty to the owners of the servient estate, and to maintain and repair the right of way (Appendix A, page 10).

REASON FOR DENYING WRIT

I.

Jurisdiction

Petitioner claims that jurisdiction of the Supreme Court to review the decision of the Idaho Supreme Court is invoked under 28 U. S. C. § 1257 (3), and then allege a constitutional question under Section 1 of the Fourteenth Amendment of the Constitution of the United States and Idaho Code 7-704.

This case does not lend itself to being a Federal question of substance not heretofore determined by this Court, and under Rule 19 (a) of this Court, the Writ should not be issued. The question is not substantial, and nothing new or novel is presented in this case. Water rights in the western states have traditionally been left to the states to determine. *Nash v. Clark,* 198 U. S. 361, 25 S. Ct. 676 (1905) and *Fallbrook Irrigation Dist. v. Bradley,* 164 U. S. 112, 159, 41 L. Ed. 369, 388, 17 S. Ct. 56 (1896).

This Court has also held that it has no jurisdiction to review a mere declaratory judgment. *Liberty Warehouse Co. v. Grannis,* 273 U. S. 70, 46 S. Ct. 282, 71 L. Ed. 541,

and *Liberty Warehouse Co. v. Burley Tobacco Growers Co-Op Marketing Ass'n.*, 276 U. S. 71, 48 S. Ct. 291.

This action being a declaratory judgment did not actually take any property from TFCC. It set out the law of Idaho on the subject before the Court. It will be necessary for Canyon View to file a condemnation action against TFCC.

II.

The questions answered by the Idaho Supreme Court were all a part of the issues put forth by the pleadings and stipulated facts.

In the petitioner's brief they contend that the district court confined its decision to those specific issues raised by the question put before it and the stipulated facts. They then contend that the Supreme Court of the State of Idaho did not confine itself to the issues presented to it and to the stipulated facts.

As pointed out in petitioner's brief, one of the issues presented for decision was:

> "a. Does Canyon View Irrigation Company have the right of eminent domain to condemn into a portion of the Canal Company's physical system *and compel operation thereof by the Canal Company for both parties?*" (emphasis supplied) (Appendix B, pg. B-7)

The district court answered this question by holding that Canyon View could not compel the operation of the joint system by TFCC by both parties, and therefore Canyon View did not have the right of eminent domain to condemn and to apportion TFCC's physical system. The Supreme Court of the State of Idaho answered the ques-

tion by holding that Canyon View did have the right of eminent domain, that this right could not be defeated by TFCC refusing to operate and maintain the canal for both co-tenants, that neither could exclude the other, and that each is obligated for its pro rata contribution for operation and maintenance costs (Appendix A, page 10). To this writer this answer is a logical answer to the question posed to the court.

The petitioner also maintains that the question of necessity was not presented to the court by this case or by the stipulation. The question posed to the court, which was whether or not Canyon View has the right of eminent domain to condemn and use a portion of TFCC's physical system (Appendix B, page 7), raises the question of necessity under Idaho Code § 7-704 which is set out on page 3 of petitioner's brief. The district court's opinion held that Canyon View's proposal was not a public use and the question of necessity was not before it (Appendix C, page 14). The Supreme Court in its opinion found that Canyon View could condemn the right to enlarge and use the existing canal in common with the Twin Falls Canal Company (Appendix A, page 7). It then pointed out that Canyon View need not establish a "more necessary public use" and must only show a reasonable necessity. The court relied upon the stipulation of the parties that, "no natural waterway exists by which Canyon View's water can be transported by gravity from the Snake River to its stockholders' land," and concluded that this fact, when considered in conjunction with the excessive cost of constructing a parallel canal system, would satisfy the necessary requirement of reasonable necessity (Appendix A, pages 8 and 9).

This case is thus distinguished from the cases cited by the petitioner, as no questions or issues were raised or answered by the Supreme Court which were not included in the stipulation or ruled upon by the district court or the Supreme Court, and this case was for Declaratory Judgment only.

CONCLUSION

This court has no jurisdiction to issue a Writ of Certiorari on a declaratory judgment and should not do so in this case which set forth the law of the state only. A separate condemnation action must be filed before Canyon View will have any right in TFCC's canal system.

It is clear from the record that the petitioners did have notice that issues of joint operation and maintenance and of necessity were raised by the pleadings and stipulated facts submitted to the district court and ruled upon by the district court and the Supreme Court. The district court ruled in favor of petitioners and the Supreme Court ruled in favor of the respondents. TFCC was thus not denied an opportunity to be heard upon any issues involved in this case, nor was it denied the right to defend their position. Briefs covered the questions, as did oral argument. There was no denial of due process in this action. The Supreme Court of the State of Idaho concluded its decision with the following sentence, "We think that conclusion is consistent with the well recognized policies of this state of maximum economic utility of water resources and the development and reclamation of arid

lands. Nothing in the statutes or prior case law convinces us otherwise." (Appendix A, page 13).

The decision of the Idaho Supreme Court is well reasoned and legally correct. The questions TFCC raises here can be raised in the condemnation suit itself and ruled on by the district court in the condemnation suit.

For the reasons set forth herein, respondents sincerely urge this court to deny petitioner's Petition for Writ of Certiorari.

DATED this 12th day of March, 1981.

Respectfully submitted,

HEPWORTH, NUNGESTER & FELTON

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